IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AT&T COMMUNICATIONS OF THE MIDWEST, INC., Petitioner, **vs.** **IOWA UTILITIES BOARD,** Respondent, --- **COON RAPIDS MUNICIPAL COMMUNICATIONS UTILITY; LAURENS MUNICIPAL BROADBAND COMMUNICATIONS UTILITY,** Intervenors, **FIBERCOMM, L.C.; FOREST CITY TELECOM, INC.; HEART OF IOWA COMMUNICATIONS, INC.; INDEPENDENT NETWORKS, L.C.; and LOST NATION-ELWOOD TELEPHONE COMPANY,** Claimants/Intervenors, **OFFICE OF CONSUMER ADVOCATE,** a division of the Iowa Department of Justice, Intervenor, **GOLDFIELD ACCESS NETWORK, L.C.,** Intervenor, **IOWA ASSOCIATION OF MUNICIPAL UTILITIES,** Intervenor.	**Case No. CV 3985** **RULING ON AT&T's PETITION FOR JUDICIAL REVIEW and RULING ON COMPLAINANTS' INTERVENTION AND CLAIM ADVERSE TO PETITIONER AND RESPONDENT**

The above-captioned administrative appeal and motion came before the Court for hearing on October 4, 2002. The Petitioner, AT&T Communications of the Midwest, Inc., (referred to as "AT&T") was represented by its attorneys, Richard W. Lozier, Jr. and David M. Miles. Iowa Utilities Board, Respondent in both motions (referred to as the "Board") was represented by its attorney, David J. Lynch. Claimants/Intervenors FiberComm, L.C. ("FiberComm"), Forest City Telecom, Inc. ("FCTI"), Heart of Iowa Communications, Inc. ("Heart of Iowa"), Independent Networks, L.C. ("IN"), and Lost Nation-Elwood Telephone Company ("Lost Nation") (collectively referred to as "Complainants") were represented by its attorney, Robert F. Holz, Jr. Intervenor Office of Consumer Advocate (referred to as "Consumer Advocate") was represented by its attorney, Jennifer Easler. Intervenor Goldfield Access Network, L.C. (referred to as "Goldfield") was represented by its attorney, Dennis L. Puckett. Intervenors Coon Rapids Municipal Communications Utility and Laurens Municipal Broadband Communications Utility (collectively referred to as "Coon Rapids") were represented by its attorney, Ivan T. Webber. Following oral argument by counsel, and upon review of the court file, certified record, and applicable law, the Court enters the following ruling.

I. ISSUES

Petition for Judicial Review Brought by AT&T:

A. Whether the Board correctly found that Iowa law requires AT&T connect with all CLECs in Iowa, so as to provide toll services to the customers of those carriers.

   1. Whether the Board correctly interpreted Iowa Code section 476.101(9) (2001).

   2. Whether the Board correctly interpreted Iowa Code section 477.11 (2001).

B. Whether the Board erred in failing to require the CLECs to reduce their access rates on a going-forward-basis to the level of rates established by the ILECs.

C. Whether the Board correctly found AT&T constructively ordered intrastate access service from any of the CLECs, thus, obligating it to pay for that service.

D. Whether the Board correctly found the Filed Rate Doctrine requires AT&T to pay for intrastate access services provided prior to October 25, 2001 at the CLECs' then existing access tariff rates.

Adverse Claim Brought by Complainants:

A. Whether the Board issued a final order requiring Complainants to reduce their access charges by filing new tariffs that eliminate the CCL charge; and whether such order was in violation of constitutional and statutory law; and whether such order was *ultra vires* of the Board's authority to waive its rules.

B. Whether the Complainants received adequate notice that the level of their access charges would be an issue in the proceedings before the Board.

C. Whether the Board committed error when it waived 199 I.A.C. § 22.14(2)(d)(1).

II. STATEMENT OF THE CASE

This proceeding was initiated on August 16, 2000 by the filing of a complaint with the Board. FiberComm, L.C. ("FiberComm"), Forest City Telecom, Inc. ("FCTI"), Heart of Iowa Communications, Inc. ("Heart of Iowa"), Independent Networks, L.C. ("IN"), and Lost Nation-Elwood Telephone Company ("Lost Nation") (collectively referred to as "Complainants") jointly filed a complaint against AT&T Communications of the Midwest, Inc. ("AT&T"). AT&T is an interexchange carrier ("IXC") providing toll services from and to local exchanges throughout the State of Iowa, including exchanges served by Complainants. Complainants are each non-rate-regulated competitive local exchange carriers ("CLEC") certified by the Board. They offer local exchange telephone services in competition with certain existing incumbent local exchange carriers ("ILEC") in parts of the State of Iowa.

The Complaint alleges AT&T is attempting a selective withdrawal from the interexchange market by instructing Complainants to "cease routing all traffic to AT&T's network." The Complaint was filed in response to actions by AT&T wherein it discontinued paying Complainants the full amount of their tariffed rates for originating and terminating access services. The Board initiated formal complaint proceedings pursuant to 199 I.A.C. § 6.5(3) and accordingly docketed the matter as Docket No. FCU-00-3. AT&T filed an answer on September 25, 2000 taking the position it did not have to pay for the access services provided by Complainants because it had not ordered such services under the terms of the tariffs and was furthermore not required by law to connect with the Complainants.

The Complaint requests the Board interpret the obligations of the Complainants and AT&T pursuant to Iowa law. It also requests the Board order AT&T to pay Complainants, based upon Complainants' tariffed rates, for access services that have already been provided to AT&T. The Complaint alleges a violation of Iowa Code section 477.11 (2001), which provides that "[L]ong distance companies shall furnish equal facilities to any local exchange within the state desiring same..."[1]; a violation of section 476.8, which provides that "[E]very public utility is required to furnish reasonably adequate service and facilities"[2]; and inconsistency with universal service principles by attempting to single out rural customers of CLECs.[3] The complaint alleges jurisdiction pursuant to section 476.11 (2001).[4]

[1] Complaint, ¶ 16.
[2] Complaint, ¶ 17.
[3] Complaint, ¶ 18.
[4] Complaint, ¶ 14.

Petitions to intervene were filed by Goldfield Access Network, L.C. ("Goldfield"), Coon Rapids Municipal Utilities ("Coon Rapids"), Laurens Municipal Broadband Communications Utility ("Laurens"), the Iowa Association of Municipal Utilities ("IAMU"), and the Consumer Advocate. No objections to any of the requests for intervention were filed, thus, the Board granted the requests. Each of the Complainants and each of the Intervenors, other than IAMU and the Consumer Advocate, is a CLEC. The Complainants and Intervenors are collectively referred to hereafter as "the CLECs."

Upon receipt of the Complaint, the Board ordered a meeting, facilitated by Board staff, among the Complainants, AT&T, and the Consumer Advocate. In addition to the Complainants, AT&T, and the Consumer Advocate, some of the intervenors also attended the meeting. The meeting, which was intended to clarify the facts and resolve differences, was held on October 10, 2000. The parties were unable to resolve their differences at the meeting, so direct and responsive testimony was prefiled pursuant to the procedural schedule set by the Board. Hearings for the purpose of cross-examination of the prefiled testimony were held on February 21 through 23, 2001; and again on March 21 and 22, 2001. Initial briefs were filed on April 25, 2001. Responsive briefs were filed on May 25, 2001.

On April 23, 2001, Coon Rapids and Laurens filed a motion to reopen the hearing for the purpose of taking additional evidence. On May 2, 2001, AT&T filed a resistance to the motion to reopen. On September 6, 2001, the Board issued an order denying the motion.

The Board issued its Final Decision and Order on October 25, 2001 ("Final Decision"). First, it determined AT&T was required by law to interconnect with the Complainants and provide long distance service to the customers of Complainants. Second, it found AT&T had constructively ordered access services and was thus bound to pay the tariffed rates for that service through the date of the Board's Order. Third, the Board also ruled the access charges of the Complainants were not just, reasonable, and nondiscriminatory.

On November 14, 2001, Complainants filed a motion entitled "Application For Rehearing," the basis of which was that the Board should not have considered the issue of the reasonableness of the Complainants' access rates. The Application asserts the Board did not have jurisdiction to consider this issue since it was never formally raised nor litigated, thus, providing Complainants no notice and opportunity for hearing pursuant to Iowa Code section 476.101(1) (2001). Complainants asked the Board to strike that portion of its Final Decision that dealt with the reasonableness of Complainants' access rates and that ordered Complainants to file new tariffs.

AT&T also filed an application for rehearing on November 14, 2001. AT&T alleged the Board erred in finding Iowa law required AT&T to interconnect with Complainants and in finding AT&T had constructively ordered access services from Complainants. AT&T also sought to have the board set the Complainants' access rates at the same level as those of the ILECs serving the same exchanges from the date of the Board's Order forward.

On January 25, 2002, the Board issued a decision entitled "Order Denying Rehearing, Lifting Stay, and Waiving 199 I.A.C. § 22.14(2)(d)(1)" ("Rehearing Order").

The Board denied relief requested by AT&T, finding the arguments it made had already been considered and rejected. The Board also denied Complainants' request for rehearing on the issue of the reasonableness of their access rates. In doing so, however, the Board recognized one of its own rules mandated the three-cent-per-minute CCL charge it had ordered removed from Complainants' tariffs. The Board, *sua sponte*, waived its rule as it applied to the Complainants.

On February 22, 2002, AT&T filed the Petition for Judicial Review of the Board's Final Decision and Rehearing Order. AT&T seeks judicial review of the Board's interpretation of Iowa Code sections 476.101(9) and 477.11 (2001). AT&T also seeks review of the Board's determination that the just and reasonable rate for intrastate-switched access service may exceed the rates charged by ILECs serving the same exchanges. In addition, AT&T seeks review of the Board's determination that it constructively ordered CLEC intrastate switched access services for past periods, that it is obligated to pay for such services at the tariffed rates in effect at the time the services were provided, and that the Board lacks the power under Iowa Code sections 476.11 and 476.3(1) (2001) to disturb those rates by virtue of the filed rate doctrine.

On April 3, 2002, the Complainants filed a Motion entitled "Appearance, Intervention and Claim Adverse to Petitioner and Respondent" (an action contesting the Board's jurisdictional ability to address the issue of reasonableness of Complainants' access rates, a matter which they argue was not before the Board).

On April 23, 2002, the Complainants filed a Motion entitled "Clarification of Order or Stay Pending Appeal." In that Motion, Complainants pointed out to the Board that no deadline had been established for filing a new tariff and sought an order clarifying

that the new tariffs did not have to be filed until, and unless, the judicial review process was complete. In the alternative, Complainants sought a stay of the requirement that new tariffs be filed until such time as the judicial review process was complete. The Board entered an Order denying Complainants' request for stay and requiring tariffs be filed was issued on April 26, 2002. In that Order, Complainants were directed to file their new tariffs within forty-five (45) days.

On May 8, 2002, the Complainants filed a motion for expansion of order. The motion requested the Board to clarify that the effective date of the new tariffs would be January 25, 2002, which was the date on which the Board waived its rule removing the requirement that Complainants charge a three-cent-per-minute CCL charge. On June 6, 2002, the Board issued an order denying Complainants' motion for expansion of order, finding the Board had the statutory authority to order the Complainants to reduce their access charges and that it did not have to waive its rule imposing the three-cent charge at the time it ordered the reduction.

III. STATEMENT OF THE FACTS

Complainants and Intervenors are termed CLECs because they operate in communities where there is already an existing carrier, generally referred to as an ILEC. The CLECs compete with these ILECs (the ILEC services are predominantly provided by Iowa Telecom (formerly GTE) and Qwest (formerly US WEST)). The CLECs are generally the only alternative to the ILECs for local exchange service in each community (CLECs and ILECs are collectively referred to as local exchange carriers or "LECs"). LECs are telephone companies that provide local telephone service to customers in specific geographic areas known as service territories or exchanges. These areas are

specified in certificates of public convenience and necessity issued to LECs by the Board pursuant to Iowa Code section 476.29 (2001). The LECs operate local telephone networks that consist of local "loops" (the wires strung on telephone poles or buried underground) that connect each customer to a "central office" switch. These central office switches are connected to each other and route local calls throughout the local exchange.

The local network is required not only for making local calls, but also to originate and terminate interexchange (IXC), also termed long distance, calls. When a customer dials a long distance telephone number, the LEC serving that customer delivers the call to the customer's preferred IXC. This is referred to as "originating access." The long distance carrier then routes the call to the local carrier that serves the called customer, and the LEC completes the call by routing it to the called customer. That service is called "terminating access."

AT&T provides long distance toll services to its customers throughout the State of Iowa. In order for AT&T to complete long distance telephone calls for its customers, it must purchase both originating and terminating access service from the customer's LEC. This allows AT&T to originate long distance telephone calls from within the local exchange area and also to complete long distance telephone calls placed from outside the exchange area to end users within the exchange area. Many of the CLECs provide access services to IXCs through Iowa Network Services, Inc., ("INS"). INS is a fiber optic network and switching system that concentrates the long distance traffic to and from the numerous independent rural Iowa telephone companies. INS provides centralized equal access ("CEA") for companies it has traffic agreements with, referred to as participating

telephone companies ("PTC"). INS also coordinates the administrative functions and ordering process for exchange access on behalf of the PTCs. INS handles all arrangements on behalf of the local exchanges in connecting with IXCs.

The LECs file access tariffs with the Board for *intrastate* access services and with the Federal Communications Commission (FCC) for *interstate* access services. Most large LECs file their own access tariffs, but many smaller LECs concur in model access tariffs that are filed by the National Exchange Carrier Association ("NECA") with the FCC and by the Iowa Telecommunications Association ("ITA") with the Board. Each of the CLECs in the present case adopted and filed with the Board an intrastate access tariff that concurs in the access tariff ITA filed with the Board. The CLECs' rates for intrastate access services are approximately twice the rates charged by Iowa Telecom, and three to four times the rates charged by Qwest, for similar access services.

AT&T believes it should not be required to purchase and pay for access services from the CLECs at rates it deems to be non-competitive. In 1998, AT&T adopted a nationwide policy under which it refused to pay for CLEC access services in exchanges where the ILEC access charges are lower than those of the CLEC. The CLECs challenge the legality of AT&T's policy in this proceeding.

To summarize, AT&T has refused the CLECs' access services and charges in a number of Iowa exchanges because each CLEC's access charges are higher than the ILEC's charges in the same exchange. As a result, customers in these exchanges who wish to purchase long distance service from AT&T must order their local exchange service from the ILEC. These are the basic facts underlying this complaint proceeding,

as shown in the record made before the Board; further facts from the record will be identified and discussed as necessary.

IV. STANDARD OF REVIEW

Judicial review of a final agency action is governed by application of standards set out in Iowa Code section 17A.19 (2001). The court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. Iowa Code § 17A.19(10)(f) (2001). "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Iowa Code § 17A.19(10)(f)(1) (2001). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code § 17A.19(10)(f)(3) (2001).

The court shall also reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(c) (2001). See also Iowa Code § 17A.19(10)(a)-(n) (describing other grounds which mandate reversal, modification, or

other appropriate relief from agency action). In making the determinations required by subsection 10, paragraphs "a" through "n," the court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(11)(b) (2001). However, appropriate deference is given when the contrary is true. Iowa Code § 17A.19(11)(c) (2001).

The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. Iowa Code § 17A.19(8)(a) (2001). The Court shall make a separate and distinct ruling on each material issue on which the court's decision is based. Iowa Code § 17A.19(9) (2001).

V. ANALYSIS AND CONCLUSIONS OF LAW

In its Final Decision, the Board made the following findings which provide a general framework and structure for the issues analyzed in the sections below: (1) AT&T's actions in refusing to serve customers of the Complainants and Intervenors are in violation of Iowa Code section 476.101(9) (Final Dec'n, p. 9); (2) AT&T's actions in refusing to connect with all local exchange carriers are in violation of Iowa Code section 477.11 (Final Dec'n, p. 11); (3) the rates charged by the CLECs for intrastate access services in Iowa are unreasonably high, and are not just, reasonable, and nondiscriminatory (Final Dec'n, p. 21); (4) AT&T constructively ordered intrastate access services from CLECs and is obligated to pay for these services (Final Dec'n, p. 29); and (5) pursuant to the filed rate doctrine, AT&T must pay for the access service provided prior to October 25, 2001, at the CLECs' then existing tariff rates (Final Dec'n, p. 30).

The Complainants were ordered to file new tariffs that removed the three-cent-per-minute Carrier Common Line ("CCL") charge, but which were otherwise the same. It was ordered these new tariffs would apply from the date of the Board's Order forward. The Board also ruled that after the Complainants filed their new tariffs, they could propose higher access charges, to the extent they could be justified. AT&T would then have an opportunity to challenge those rates in a procedure before the Board.

A. Whether the Board correctly found that Iowa law requires AT&T connect with all CLECs in Iowa so as to provide toll services to the customers of those carriers.

1. Iowa Code § 476.101(9)

The first issue before the Court is whether the Board misinterpreted Iowa Code sections 476.101(9) and 477.11 as requiring AT&T to accept and pay for intrastate access services. Iowa Code section 476.101(9) provides in relevant part as follows:

> A telecommunications carrier, as defined in the federal Telecommunications Act of 1996, shall not do any of the following:
>
> ***
>
> (c) take any action that disadvantages a customer who has chosen to receive services from another telecommunications carrier.

AT&T is a "telecommunications carrier" as defined in the Telecommunications Act of 1996. See 47 U.S.C. § 153(44). The "customers" referred to in this case are those of the LECs in Iowa. The Board argues the language of this statute is clear and its application to the facts of this case is straightforward. The Court agrees with the Board's following assessment,

> By refusing to accept customers who have chosen a CLEC as their local exchange service provider, but accepting other customers in the same exchange who receive local exchange service from the ILEC, AT&T was taking action that disadvantaged the first group of customers solely because of the customers' choice of another telecommunications carrier, in

> violation of the plain language of this statute.... The actions that disadvantage the customers are AT&T's, not the CLECs'; AT&T's claim that the CLECs cause any customer disadvantage is rejected.

(Final Dec'n, p. 9). The Court agrees with the Board in finding that AT&T's actions in refusing to serve customers of the CLECs were in violation of section 476.101(9). AT&T's actions disadvantage the customers who have chosen to receive service from a CLEC instead of an ILEC. Under AT&T's 1998 nationwide policy, a CLEC's customer would be unable to receive calls from other callers who use AT&T's services and unable to place calls to persons who use AT&T's toll-free numbers. In each of these situations the CLECs' customers are disadvantaged as a result of the customer's choice of the CLEC for local exchange service, and the disadvantage is the result of AT&T's actions because AT&T chose to engage in self-help, unilaterally refusing to pay access charges, rather than file a proper challenge with the Board.

In their Brief, AT&T attempts to create an argument using the following chain of reasoning: Section 476.101(9) states that AT&T shall not take any action that disadvantages a customer. AT&T has not taken any action that "disadvantages" any customer of the CLECs involved in the present case. If AT&T does not purchase the CLECs' services customers will still be able to originate long distance calls (AT&T will not block calls originating from the CLECs) and terminate long distance calls (AT&T will allow their calls to terminate through the CLECs and simply not pay the charges). Additionally, the CLECs' customers do not need to go through AT&T since there are other long distance carriers to choose from. (Petitioner's Brief, p. 17-18). Therefore, AT&T concludes the CLEC customers have not been "disadvantaged" by its refusal to purchase the CLECs' access services.

The Court finds AT&T's reasoning to be completely circular. AT&T adopted the nationwide policy in 1998 and has implemented it by refusing to pay for CLEC access services. AT&T argues it has not disadvantaged any customers since it has delivered incoming and outgoing calls. However, AT&T is not proposing to provide free long distance services to customers of CLECs it is refusing to do business with. These customers will not be allowed to place free calls to persons who use AT&T's toll-free numbers. Alternatively, the CLECs are not going to offer AT&T free terminating access simply so their customers can receive calls from AT&T customers. Those CLEC customers would not be able to receive incoming long-distance calls if those calls were placed by AT&T customers. It is impossible to conceive of a situation wherein AT&T could do business with preferred LECs in Iowa, thereby choosing to pay for some CLECs' services while not paying for other CLECs' services, and at the same time provide the same long distance benefits to all Iowans. It is inevitable that some customers of CLECs will be disadvantaged.

AT&T continues its argument by making the following statement, which it believes further "confirms their conclusion":

> In order for the Board to rule that AT&T was 'disadvantaging' the customers of those CLECs...the Board would have had to determine that it was unreasonable for AT&T to consider the price of access a relevant consideration in deciding what access services it would purchase from local exchange carriers, and that it was unreasonable for AT&T to elect not to purchase access services from those CLECs that charged rates for access that made it unprofitable for AT&T to serve their customers.

(Petitioner's Brief, p. 18-19).

The Board would not have to determine this. Section 476.101(9) clearly mandates that AT&T "shall not take any action that disadvantages a customer." There is

nothing in the statute that gives AT&T the right to consider the price of access services in determining whether to connect. AT&T must connect with all LECs in Iowa if it chooses to do business here with any one LEC. This is necessary in order to ensure all customers can connect with each other. If AT&T does not like a price a CLEC is charging, due to the nature of the industry in which it operates, it cannot block calls. Instead, it can file a written complaint with the Board pursuant to Iowa Code section 476.11, asking the Board to determine the just and reasonable terms and procedures for exchange of toll traffic with the CLEC.

By refusing to pay the CLECs' lawfully established access rates, AT&T has taken action that will disadvantage the customers of the CLECs and as such AT&T is in violation of Iowa law. The Board correctly so found.

2. Iowa Code section 477.11

Iowa Code section 477.11 is more specific in its language than section 476.101(9) and is intended to alleviate the same policy concerns within the communications industry regarding the ability of all Iowans to connect with each other and others outside the state. This section provides in relevant part as follows:

> Long distance companies shall furnish equal facilities to any local exchange within the state desiring same, and to that end shall immediately make, or at the option of the long distance company, shall immediately permit to be made under its direction and at reasonably accessible places to be designated by such long distance company, the necessary connections between said local exchange and said long distance company telephone system to effect the furnishing of equal facilities to such local exchange.

AT&T argues that its only obligation is to establish physical connections and furnish facilities to each local exchange in a geographical sense rather than connect with each local exchange company within the local exchange area. The history of section

477.11, including Supreme Court caselaw, clearly supports the Board's conclusion that the plain and clear meaning of this section is that long distance companies must furnish long distance connections and services to any local exchange within Iowa desiring such services in order to ensure all calls are completed. "[N]o customers interexchange call should be blocked due to a commercial dispute between carriers or the decision of an ICX to refuse to connect with a particular LEC." (Final Dec'n, p. 9).

The facts in State v. Northwestern Bell Tel. Co., 240 N.W. 252 (Iowa 1932) arise out of the situation where a long distance company refused to establish connections with a local exchange carrier in Iowa. Id. at 253. The Iowa Supreme Court held that "[i]n the absence of a statute requiring same, it is wholly optional with public utilities, such as telephone companies, whether they will make physical connection with other similar organizations or not." Id. at 254. The Court was unable to construe the then-existing statutes to require such a connection and concluded that "[t]he question is for the legislature." Id. at 256. The Board asserts the legislature responded to this 1932 opinion by adopting what is now identified as section 477.11. Senate file 24 is headed "An ACT to require telephone companies to furnish equal service and facilities to each other without discrimination." (Acts 1933-34 Ex. Sess. (45 G.A.) ch. 102, § 2, Approved December 30, 1933).

In light of this history, the Court agrees with the Board that the intention behind section 477.11 is that all telephone networks be physically interconnected such that all calls between any two customers may be completed. AT&T's argument that physical connection alone is enough to satisfy the statute is unpersuasive. Calls cannot be completed without the accompanying universal services of AT&T.

The Board gives the following example of "call blocking" and accompanying explanation:

> [I]f the parties were permitted to block calls in the manner they have suggested, an AT&T customer located in Des Moines or Chicago would be unable to call a customer of one of the complainant CLECs simply because AT&T and the CLEC are unable to agree on the reasonableness of the CLEC's terminating access charges. Also, customers of the CLECs would be unable to access toll-free numbers served by AT&T. Each of these results would be contrary to the state's policy of encouraging the availability of communications services from a variety of providers, see § 476.95, and the public interest as expressed in § 477.11.

(Final Dec'n, p. 10).

AT&T argues that the purpose of section 477.11 was to make physical connections with LECs and avoid discrimination between different local exchange carriers, but not to require IXC's to furnish services to all CLECs without regard to cost. As support for the argument that the intention and motive behind section 477.11 was to avoid discrimination, AT&T cites Northwestern Bell Tel. Co. v. Hawkeye State Tel Co., 165 N.W.2d 771, 775 (Iowa 1969) and Northwestern Bell Tel. Co. v. Farmers Mut. Tel. Co., IUB Docket No. FCU-90-6 (May 10, 1991). Upon review of Northwestern Bell v. Hawkeye State, the Court observes that the issue in this case was jurisdictional. The code section at issue in Northwestern Bell v. Hawkeye State, Iowa Code section 488.11 (1966), is the predecessor to its contemporary counterpart, section 477.11 (2001). AT&T gleaned the concept of discrimination from the following dicta of the court:

> Our reading of section 488.11 makes abundantly clear its purpose is to insure that any local telephone exchange within the state, such as Hawkeye, which desires connection with the lines of a long distance telephone company shall have such facilities furnished it on an equal basis in order to avoid discrimination among various exchanges.

Northwestern Bell v. Hawkeye State, 165 N.W.2d at 775. This dicta was part of a chain of reasoning that led the court to its holding. The court concluded that the commerce commission had jurisdiction to consider the issue of where the long distance company could make its connection. Id.

AT&T then distinguishes between two terms immediately preceding Iowa Code section 477.11: "local exchange" and "local exchange company." It argues the term "local exchange," defined in section 477.10(1), refers to the physical facilities – the telephone lines and switchboards – used to provide services within a local franchised exchange area. By contrast, it argues the term "local exchange company," defined in section 477.10(2), refers to the entity that provides services within the local exchange. AT&T cites this distinction as support for the proposition that AT&T's only obligation under section 477.11, which refers only to "local exchange," is to establish physical connections with, and furnish the necessary facilities to, each local exchange, and not to purchase the access services offered by every CLEC. The Court finds this reasoning to be unpersuasive in its attempt to again draw from the legislature an unintended distinction between facilities and services. Such an important distinction would have been more clearly inserted by the legislature.

3. Conclusion

Taken together or separately, sections 476.101(9) and 477.11 require that AT&T interconnect with all local exchange carriers in any particular exchange, including the CLECs, and complete all calls originating or terminating via AT&T's services, regardless of the identity of the LEC. The CLECs are not foisting unordered access services upon AT&T since AT&T can choose not to do business in Iowa altogether. This does not

require AT&T to purchase services from the CLEC "without regard to price," as AT&T argues. If AT&T believes at any time that a particular LEC's access charges are unreasonable, the interexchange carrier may file a written complaint with the Board pursuant to section 476.11, asking the Board to determine the just and reasonable terms and procedures for exchange of toll traffic with the CLEC.

B. Whether the Board erred in failing to require the CLECs to reduce their access rates on a going-forward-basis to the level of rates established by the ILECs.

AT&T claims the Board erred when it failed to set the CLECs' access rates at the same level as the ILECs' rates in each exchange. The Board made the following jurisdictional determinations which AT&T has recognized as being correctly determined: The Board found under Iowa Code section 476.101(1) that the CLECs' market power with respect to interexchange access permits the Board to apply to CLEC access services such other provisions of chapter 476 as the Board deems appropriate. The Board found it had the authority to review and set new CLEC access charges under either Iowa Code sections 476.11 or 476.3, and that the tariffed access rates of the CLECs in this case were "unreasonably high" and "not just, reasonable, and nondiscriminatory." (Final Dec'n, pp. 15, 17).

The Board's decision to reduce the CLEC access charges by three cents, as discussed under Division IV. C. below, exceeded the Board's authority. The Board erred in addressing any rate change, let alone for the reasons urged by AT&T. The Board's decision is reversed on this issue. Any determination of a rate change must be after it is appropriately raised, proper notice is given and the parties provided a hearing to present evidence on this issue.

C. Whether the Board correctly found AT&T constructively ordered intrastate access service from any of the CLECs and was thus obligated to pay for that service.

AT&T asserts the Board erred in concluding it had "constructively ordered" the CLECs' intrastate access services prior to October 25, 2001. AT&T argues the constructive ordering doctrine does not apply to the facts in this matter, and even if it did, the Board (1) did not apply the correct legal standard; and (2) erred in concluding that the facts supported a finding of constructive ordering.

AT&T contends that under the filed rate doctrine, a customer that has not ordered service under a carrier's tariff is under no obligation to pay that carrier. AT&T correctly cites the law in United Artists Payphone Corp. v. New York Tel. Co., 8 FCC Rcd 5563, 5565 (1993), a case wherein the FCC develops a protocol for determining whether someone ordered telecommunications services if the tariff does not define the term "order." AT&T then asserts the constructive ordering doctrine does not apply in this case because each of the CLEC tariffs at issue prescribe specific requirements for the ordering of the CLEC's switched access services. (See Final Dec'n, p. 23; 199 I.A.C. 22.15(2); Petitioner's Brief, footnotes 39 & 40, p. 26).

The Board responded by drawing the Court's attention to a ruling overlooked by AT&T, which it relies heavily upon in its Final Decision,[5] entitled Advamtel LLC v. AT&T Corp., 118 F.Supp.2d 680 (E.D. Va. 2000). The factual situation in Advamtel is indeed similar to the situation in the present case. Plaintiffs, a group of sixteen CLECs filed an action against AT&T to collect access charges. Id. at 680. AT&T initially "refused to pay the tariff rates for these access services, claiming that it [wa]s not obligated to pay the plaintiffs' tariff rates because they are 'unreasonable' and in

violation of 47 U.S.C. § 201(a), (b)." Id. at 682. AT&T then formed the legal argument "that it is not obligated to pay because it never ordered any services pursuant to the terms specified in the tariff." Id. at 684.

It was undisputed that the tariffs set forth a procedure to order services via a specified written order form and that the Plaintiffs did not receive such written requests. Id. 684-85. The fighting issue in the case was "whether the tariff rates apply even where the services are not ordered in the manner prescribed by the tariff." Id. at 685. The court ultimately denied AT&T's summary judgment motion, finding a "genuine issue of material fact remains as to whether AT&T constructively ordered service form the plaintiffs." Id. at 687.

The Advamtel court turned to United Artists for authority it could use to look beyond the tariff in order to determine whether there had been a "constructive ordering."

> In United Artists, the FCC looked beyond the definition of "ordering" found in the carrier's tariff to determine whether United Artists was AT&T's customer, and therefore whether it was required to pay the tariff rate.... Ultimately, the FCC concluded that if United Artists "failed to take steps to control unauthorized charges, it could reasonably be held to have *constructively* ordered services from the carrier".... Thus was born the constructive ordering doctrine under which a party "orders" a carrier's services when the receiver of services (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services....

Advamtel, 118 F.Supp.2d at 685 (quoting United Artists, 8 FCC Rcd 5563 at ¶ 13; In re Access Charge Reform, 14 FCC Rcd 14221 (1999) at ¶ 188) (original altered). That court clarified that "the filed-rate doctrine applies only where the policy of nondiscrimination in rates is implicated.... In other words, deviations from the filed tariff that do not result in rate discrimination are not barred by the filed-rate doctrine."

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[5] Final Dec'n, pp. 29-30 & Rehearing Order, pp. 13-14.

Id. at 686. The court found that Davis v. Henderson, 266 U.S. 92 (1924), could be applied to the Advamtel case to reason that while the IXC could not demand waiver of the CLEC's tariff provisions, the CLEC with a validly filed tariff could recover the tariff rate after the IXC had obtained the benefit of the CLEC's services. Id. The court then concluded that "[w]hile the filed-rate doctrine precludes deviations from the tariff that affect the rate charged by the carrier, it does not prevent deviations when they do not affect the charged rate." Id. Further,

> [N]on-adherence to the ordering provisions results in no difference or preferential treatment in rates. It follows that the application of the constructive ordering doctrine in this context is wholly compatible and consistent with the field-rate doctrine. Indeed, only if the constructive ordering doctrine is applied here can massive rate discrimination be avoided. Application of the constructive ordering doctrine here ensures that all who received services from the plaintiffs will be charged the same rate....

Id.

Returning to the present case, it is clear the Board correctly found that the constructive ordering doctrine was implicated and "acts as an exception to the filed rate doctrine." (Final Dec'n, p. 30). The Court in Advamtel dismissed AT&T's argument that the constructive ordering doctrine would apply only when the ordering provisions in the tariff were ambiguous. Advamtel, 118 F.Supp.2d at 685. Thus, AT&T's argument that the constructive ordering doctrine does not apply because there is no ambiguity in the tariff is not legally viable.

After making this determination, the Board then applied the facts in the present case to the three-part test. In both Advamtel and the present case, AT&T communicated with the CLECs in a number of ways, informing them they had not ordered their services. The Advamtel court found this was not adequate prevention of constructive ordering;

specifically, failure of the second part of the test. (See Advamtel, 118 F.Supp.2d at 687). Similarly, the Board correctly found mere communications were not reasonable steps to avoid the receipt of the CLECs' services. AT&T also asserts it implemented a number of internal controls such as removing telephone numbers assigned to the CLECs from the lists used by AT&T personnel for outbound telemarketing and direct mail solicitations for AT&T long distance services and the modification of AT&T's systems to prevent its personnel from inadvertently sending PIC change requests to the CLECs. The Court, as did the Board, finds this is not adequate. Under Iowa law, AT&T could only have prevented receipt of originating access services by withdrawing from an exchange in its entirety, and by declining to serve customers of both the CLECs and the ILECs throughout Iowa. Id. at 687-88.[6]

Second, AT&T argues that Iowa Code section 556A.1 should limit the application of the constructive ordering doctrine in Iowa. (Petitioner's Brief, pp. 25-26, fn. 37). This Court agrees with the Board that this argument is without merit. First, section 556A.1 applies only to "goods" that are "mailed" to a person; this case concerns services that were not mailed. Second, the statute applies only to "unsolicited" goods; the whole point of the Board's finding is that AT&T constructively ordered, or solicited, access services from the CLECs by interconnecting with and delivering traffic to the CLECs. (See Respondent's Brief, p. 17).

Third, and finally, AT&T sets forth a second, independent argument that even if the FCC's constructive ordering doctrine were applicable, the Board's Final Decision

[6] Indeed, as a side note by the Court, this was the anticipated result of deregulation of the LECs. AT&T's network was already interconnected and receiving access services: "the party is interconnected in a manner such that it can expect to receive access services, fails to take reasonable steps to prevent receipt of such

applied an incorrect standard for determining whether or not a constructive order existed. AT&T turns again to United Artists for the allegedly correct definition of "constructive order" as requiring "some affirmative act by the 'customer' to establish a relationship with and receive service from AT&T...." United Artists, 8 FCC Rcd at 5565, ¶ 9. AT&T claims it connected to the switch operated by INS before the Complainants came into being and that at the time it connected to the INS switch, it "obviously had no reason to expect that it would be receiving any traffic from CLECs, and AT&T took no actions thereafter to receive the CLECs' traffic." (Petitioner's Brief, p. 28). AT&T argued it did not constructively order services through affirmative acts.

After considering AT&T's arguments and Complainants' counter-arguments, the Board found the CLECs offered evidence to show that AT&T ordered access services from the CLECs through INS. (See Final Dec'n, pp. 24-28). First, the record shows AT&T submitted Letters of Agency ("LOAs") for each of the Complainants. (Tr., p. 306). The LOA is the authorization under federal and state slamming rules by which AT&T, as an interexchange carrier, instructs the local exchange company to connect a customer served by that LEC to AT&T as a prescribed carrier. AT&T was directing that the Complainants connect the customer served by that local exchange to AT&T. Second, the record shows INS entered into a blanket letter of agency with AT&T to connect AT&T with each participating telephone company. Id. at 29-30. The Board found this agreement was entered into on February 28, 1989, and authorizes INS to connect the INX services of AT&T with the access services of each of the participating telephone companies. (Exh. 11). Initially, AT&T provided only inter-LATA service. The Board

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services and then received the services." (Final Dec'n, p. 29). Competition drove the access charges of the CLECs up. AT&T's only option at this point is total withdrawal.

further found on February 10, 1995, AT&T submitted another letter of agency to INS, indicating it would offer both inter-LATA and intra-LATA service. (Exh. 12). In conclusion, the Board states in its brief that when AT&T entered into these agency agreements with INS, it ordered service from each of the participating telephone companies, ultimately including the CLECs in this case – and that such a request for a utility connection is effective as a manifestation of AT&T's intent to pay the fair and reasonable cost of the connection pursuant to the holding in Newman v. City of Indianola, 232 N.W.2d 568, 574 (Iowa 1975). (See Respondent's Brief, p. 18).

The Court finds there was sufficient evidence offered by the CLECs for the Board to find that (1) AT&T entered into an agency relationship with INS; and (2) both AT&T and the CLECs established and used a process by which AT&T constructively ordered intrastate access services. The Board's finding of a constructive order is reasonable, correctly applies the relevant law, and is supported by the evidence in the record.

D. Whether the Board correctly found the Filed Rate Doctrine requires AT&T to pay for intrastate access services provided prior to October 25, 2001, at the CLECs' then existing access tariff rates.

AT&T argues that because the Board found the CLEC's access rates to be unjust, unreasonable and unlawful on a prospective basis in its Final Decision, then it would be arbitrary, capricious and unlawful for the Board to require AT&T to pay the tariffed access rates for periods prior to the Final Decision. Iowa Code section 476.11 expressly grants the Board the power to determine the "terms" applicable to the interchange of toll communications between two telephone companies. The authority to determine the terms applicable to the interchange of toll traffic encompasses the power to determine the governing rate. As the Iowa Supreme Court has held, section 476.11 vests the Board

"with broad, general, comprehensive powers to regulate the rates and services" of telephone companies operating within Iowa. Northwestern Bell v. Hawkeye State, 165 N.W.2d at 775.

Intervenors FiberComm et al. point out that while the Board ordered the Complainants to file new access tariffs that reflected the removal of the three-cent-per-minute CCL charge, they also noted that the Complainants could propose higher tariffs than currently being charged. (Final Dec'n, p. 22). Thus, the Board found only one aspect of the Complainants' current access rates to be unjust, unreasonable and unlawful – the CCL charge. The Board specifically noted that overall higher rates could be the end result in a rate case, so long as those rates could be justified. The Board also declined to order the removal of the CCL charge on a retroactive basis, citing the filed rate doctrine.

The Board rejected AT&T's argument on the basis the filed rate doctrine states that a filed, tariffed rate, should normally be held applicable and enforceable until it is found to be unlawful. (Rehearing Order, p. 14) (see Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990)(negative treatment indicated)). Under the Federal Communications Act of 1934, telecommunications service providers are required to file with the FCC a listing of the terms and conditions under which they will provide services to their customers. See 47 U.S.C. § 203(a). This listing, known as a tariff, sets out the charges, classifications, practices and regulations for that particular tariff. Fax Telecommunications v. AT&T, 952 F.Supp. 946, 951 (E.D.N.Y. 1996). Once filed, the tariff exclusively controls the rights and liabilities of the parties as a matter of law. Id. The duly filed tariff is the "only lawful charge. Deviation from it is not permitted upon any pretext." Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915). The

tariff is not a mere contract; it is the law. Carter v. AT&T Co., 365 F.2d 486, 496 (5th Cir. 1966).

The filed rate doctrine "conclusively presumes" that both the carrier and its customers know the contents and effect of published tariffs. Essentially, the doctrine prevents an aggrieved customer from enforcing contract rights that contradict governing tariff provisions or from asserting estoppel against the carrier. Kanuco Tech. Corp. v. Worldcom Network Services, Inc., 979 S.W.2d 368, 372 (Tex. Ct. App. 1998). The following history and explanation of the filed rate doctrine is taken largely from Intervenor FiberComm's Brief, page 30-31. "The considerations underlying the [filed rate] doctrine...are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981). No court may substitute its own judgment on reasonableness for the judgment of the Commission. Id. at 577. The Supreme Court held:

> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but also the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it "shall determine the just and reasonable rate...to be thereafter observed and in force." This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.

Id. at 578 (citations omitted). See also, Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (right to a reasonable rate is the right to the rate which the Commission files or fixes).

The Iowa Courts have also recognized that rate-making is prospective only. Under Iowa law there is not a proceeding for retrospective ratemaking. The Iowa

Supreme Court has recognized the rule against retroactive ratemaking in ADM v. Iowa Utilities Board, 485 N.W.2d 465 (Iowa 1992) where it stated:

> It is a fundamental rule of utility regulation that retroactive ratemaking is not permitted. Office of Consumer Advocate v. Iowa State Commerce Comm'n, 428 N.W.2d 302, 306 (Iowa 1988). The rule is a logical extension of the "filed rate doctrine," that is, a regulated utility may not charge – nor be forced by the regulatory agency to charge – rates at variance with a filed tariff. Associated Gas Distribs. v. Federal Energy Regulatory Comm'n, 898 F.2d 809, 810 (D.C. Cir. 1990); see Iowa Code § 476.5. The prohibition ensures the predictability and stability of utility rates and generally prevents utility companies form recovering losses that stem from "past company mismanagement or improper forecasting." Office of Consumer Advocate, 428 N.W.2d at 306. In other words, regulators "may not disinter the past merely because experience has belied projections, whether the advantage went to customers or the utility; bygones are bygones." Associated Gas Distribs., 898 F.2d at 810.

Id. at 467.

The Court finds the Board did not err in making the determination to require AT&T to make payments for services received before October 25, 2001 at the CLECs' then existing access tariff rates. There is no action for the recoupment of rates accurately charged under lawfully adopted tariffs. The access rates in the present case were filed with and approved by the Board in accordance with 199 I.A.C. § 22.14. Furthermore, this case is distinguished from the cases cited by AT&T in that there was no illegally collected revenue. Therefore, there is no legal basis upon which the Board can now retroactively find previously approved tariffed rates to be unreasonable and unjust.

VI. ANALYSIS OF ISSUES RAISED IN COMPLAINANTS ADVERSE CLAIM

The Complainants have asserted a claim adverse to Petitioner and Respondent pursuant to Iowa Code section 17A.19(2). Specifically, Complainants challenge the Board's jurisdiction and determination that the Complainants' access rates were not just, reasonable and nondiscriminatory.

A. **Whether the Board issued a final order requiring Complainants to reduce their access charges by filing new tariffs that eliminate the CCL charge.**

Complainants argue the Board committed error by ordering that they file new access charge tariffs that do not include the three-cent-per-minute CCL charge as an element. The Board responds it did not issue a final order requiring any particular CLEC to reduce its rates. Instead, the Board maintains it merely ordered that if the CLECs, in general, wanted to continue to rely on the default access rates established by the ITA they would have to eliminate the CCL from those rates. The Board continues that if, however, the CLECs believe they are entitled to higher rates, the Board has given them the explicit right to file for higher rates and show why they are entitled to those rates. In this way, the hearing has been, and is, available to them at any time upon request.

The Board explains that historically their rules have allowed a telephone industry association such as the ITA to file an "association tariff" in which various individual companies could concur, thereby avoiding the expense and difficulty of preparing, filing, and possibly defending individual company tariffs. 199 I.C.A. 22.14(2)(b). FiberComm and Goldfield chose to concur in the ITA tariff, and, therefore, charged the ITA originating and terminating access charges of approximately 8.5 cents-per-minute. In its Final Decision, the Board determined these default-level access charges to be unreasonable, unjust, and unlawful in a competitive environment where the ILEC is limited to lower access charges due to the market power each CLEC has. (Final Dec'n, p. 15-22).

The issue is whether the order in question was clearly a final decision and order. The October 25, 2001 ruling is labeled "FINAL DECISION AND ORDER." Additionally, in the ordering clause, it is stated:

> The Board finds the access charges of the complainant and intervenor CLECs are not just, reasonable, and nondiscriminatory, pursuant to Iowa Code § 476.3, and orders the CLECs to file new access tariffs with charges that reflect removal of the Carrier Common Line charge but are otherwise the same as their existing access tariffs. These new charges will apply form the date of this order. After filing a tariff in compliance with this order, each CLEC is free to propose higher access charges if it believes it can support them, and each interexchange carrier will be free to challenge those CLEC access charges if it believes the appropriate level is even lower, but the new access charge tariffs filed as a result of this order must be based on the current ITA tariff access rates minus the CCL.

(Final Dec'n, p. 32).

The Board's order imposed a new rate and the only available means of challenging that order is through judicial review. Judicial review is available only when a "person or party...has exhausted all adequate administrative remedies and...is aggrieved or adversely affected by any final agency action." Iowa Code § 17A.19(1). It is additionally provided that "[w]hen the agency presides at the reception of the evidence in a contested case, the decision of the agency is a final decision." Iowa Code § 17A.15(1).

The Court finds the Board's Final Decision and Order was final agency action that altered the existing legal tariffs of the Complainants.

B. Whether the Board's *sua sponte* action in waiving 199 I.A.C. § 22.14(2)(d)(1) was *ultra vires* of the Board's authority.

Complainants argue the three-cent CCL charge, which was eliminated in the Board's Final Decision, is required by Board rule 199 I.A.C. § 22.14(2)(d)(1). Complainants further argue that the Board lacks the legislative authority to waive this rule *sue sponte*. Through section 22.14(2)(d)(1), the Board established a requirement that all intrastate access service tariffs shall include a CCL charge of "3-cents per access

minute or fraction thereof for both originating and terminating segments of the communication."

Complainants acknowledge that 199 I.A.C. § 1.3 gives the Board authority to waive a rule on its own motion. Section 1.3 states as follows:

> In response to a request, or on its own motion, the board may grant a waiver from a rule adopted by the board, in whole or in part, as applied to a specific set of circumstances....

199 I.A.C. § 1.3. However, Complainants argue the enabling statute that grants the Board waiver authority contains no such language. Iowa Code section 17A.9A states as follows:

> 1. Any person may petition an agency for a waiver or variance from the requirements of a rule....
> 2. Upon petition of a person, an agency may in its sole discretion issue a waiver or variance from the requirements of a rule if the agency finds, based on clear and convincing evidence, all of the following:
> a. The application of the rule would pose an undue hardship on the person for whom the waiver or variance is requested....
>
> ***
>
> 3. The burden of persuasion rests with the person who petitions an agency for the waiver or variance of a rule. Each petition for a waiver or variance shall be evaluated by the agency based on the unique, individual circumstances set out in the petition.

Complainants continue their argument by reiterating the well established doctrine that administrative agencies have only such authority as is specifically conferred upon them by the legislature or necessarily inferred from the statutes creating them. Iowa Power & Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236, 240 (Iowa 1987); Iowa-Illinois Gas and Electric Co. v. Iowa State Commerce Comm'n, 334 N.W.2d 748 (Iowa 1983). Complainants further argue that the legislature conferred authority on

agencies to waive their rules, but only upon petition of a person. Iowa Code § 17A.9A. Section 17A.9A does not grant agencies the authority to waive their rules *sua sponte* on their own motion. Therefore, Complainants conclude the Board's rule 1.3 action is *ultra vires* of the statutory authority granted by the Legislature.

Upon review of section 17A.9A, the Court finds this section does not grant the Board power to waive one of its rules *sua sponte*. It is clear that a "person" must bring the petition in order to ensure the Board does not arbitrarily and capriciously cast aside policy developed through a formal rule-making process. AT&T nor any other party to the administrative proceeding asked the Board to waive this rule.

The Court concludes the Board's *sua sponte* action in waiving 199 I.A.C. § 22.14(2)(d)(1) was *ultra vires* of the Board's authority.

C. Whether the Board's action was in violation of constitutional and statutory law and board procedure.

Iowa Code sections 476.11 and 476.3(1) require that a complaint be filed in order to initiate a proceeding before the Board. Iowa Code section 476.3(1) provides the Board can bring this action on its own motion; however, a complaint must still be filed by the Board. Iowa Code sections 476.11, 476.101(1) and 476.3 all provide for notice and an opportunity to be heard on issues before the Board. Boiled down to its essence, the Board's fundamental argument is that statutes such as these, which contain language conferring jurisdiction and authority upon the agency to decide a range of issues, does not always require the issues addressed by it be specifically plead or introduced via a formal writing.

Complainants acknowledge the Board has general jurisdiction and authority to determine the issue of the reasonableness of access rates. However, Complainants argue

the reasonableness of their access rates was never an issue before the Board. Thus, no due process was afforded Complainants because they were not given notice and a reasonable opportunity to be heard on this issue. See Alfredo v. Iowa Racing and Gaming Comm'n, 555 N.W.2d 827, 832 (Iowa 1996); Fisher v. Iowa State Comm. Comm'n, 368 N.W.2d 88, 94 (Iowa 1985). Complainants state that an agency may have jurisdiction to decide a particular issue, but if it fails to afford procedural due process, it has no basis upon which to exercise that jurisdiction. Complainants argue they did not have the opportunity to adequately defend their position by preparing a defense strategy and then present evidence.

Iowa Code section 17A.12 requires that the notice in a contested case include the following:

> ***
>
> b. A statement of the legal authority and jurisdiction under which the hearing is to be held.
> c. A reference to the particular sections of the statutes and rules involved.
> d. A short and plain statement of the matters asserted.

See also Carr v. Iowa Employment Security Comm'n, 256 N.W.2d 211, 214 (Iowa 1997).

In this case, the only notice given by the Board was in the Board's Order Docketing Complaint and Establishing Procedural Schedule issued September 18, 2000. (Order dated 9/18/00). That notice does not reference any legal authority or jurisdiction and does not reference any particular statute or rules. The only matters identified are the Complainants' requests that the Board issue an order requiring AT&T to (1) permit the customers of Complainants to use the long distance services of AT&T; (2) connect the local exchange facilities of the CLECs with the interexchange facilities of AT&T for the

exchange of toll traffic; and (3) pay for the billed originating and terminating access services rendered. The Complainants did not seek to have the Board consider the reasonableness of their rates and the Board did not state that it would do so in its Docketing Order.

The Board argues section 476.11 gives the Board jurisdiction to review and determine the rates applicable to the exchange of toll traffic. See Northwestern Bell v. Hawkeye State, 165 N.W.2d at 775. The Board states in the Final Decision, "While it is true that AT&T has not brought a § 476.11 complaint in this docket, it is equally true that the complainants did, in paragraph 14 of their complaint." (Final Dec'n, p. 17). Paragraph 14 of the Complaint states as follows:

> Iowa Code section 476.11 grants the Board authority to determine the terms and procedures for the interchange of toll communication upon a complaint in writing. AT&T's attempted action is clearly illegal. This unilateral withdrawal of service violates Iowa law.

The Board argues that such general reference to this code section is adequate notice. The Board cites Alfredo, 555 N.W.2d 827, which states the following law:

> "[O]rdinarily, all that need be shown to validate administrative proceedings against persons who participate in a contested case hearing is that they had a reasonable opportunity to know of the claims which affect them and to meet those claims." Fischer v. Iowa State Commerce Comm'n, 368 N.W.2d 88, 94 (Iowa 1985).

Id. at 833. Upon review, Alfredo is distinguishable from the present case at bar. Alfredo clearly was put on notice and had a reasonable opportunity to know of the claims which affected him. Alfredo had filed an application for a license to operate an excursion gambling boat with the Iowa Racing and Gaming Commission. The commission considered the license application, however, the required background investigation was not yet completed. Alfredo's name was removed from the application, however, he

continued to enter into agreements for stock options. The commission indicated to Alfredo through various mediums that he must be approved by the commission if he intended to purchase stock in the company. Eventually, Alfredo appeared before the commission for approval. The court found Alfredo was put on notice that his suitability to hold ownership interest would be an issue since he was made aware of such through letters and other communications.

In conclusion, the Court finds that, although Complainants invoked the jurisdiction of the Board under Iowa Code section 476.11, they did not at any time indicate that the specific matter they wanted the Board to take up was the reasonableness of their own rates. Furthermore, the statement of matters asserted made no reference to the issue of the reasonableness of Complainants' access charges. This is a violation of the due process requirements of Iowa Code section 17A.12. The Board's failure to comply with the constitutional and statutory due process requirements cannot be overcome by arguing that Complainants had actual or constructive knowledge that the Board intended to consider and rule on the issue of the reasonableness of the Complainants' access charges. The record does not support the Board's argument.

VII. ORDER

IT IS THE ORDER OF THE COURT that the final agency decision of the Commissioner dated October 25, 2001 is **AFFIRMED IN PART AND REVERSED IN PART** consistent with this Ruling.

IT IS FURTHER THE ORDER OF THE COURT that this case is **REMANDED** to the Agency for proceedings consistent with this Ruling.

IT IS FURTHER THE ORDER OF THE COURT that costs are assessed one-half each to Petitioner and Respondent.

SO ORDERED this 19th day of March, 2003.

RICHARD G. BLANE II, District Judge
Fifth Judicial District of Iowa

(contested / hearing)

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